IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 22, 2006 Session

ROBERT STEWART SHOFNER, M.D., v. ANN MARGARET KALISZ SHOFNER, M.D.

Appeal from the Circuit Court for Davidson County
No. 01D-971 Muriel Robinson, Judge

No. M2004-02619-COA-R3-CV - Filed on May 31, 2006

The trial court ordered a parenting plan on September 19, 2002, which was the subject of a previous appeal to this Court. While that appeal was pending, the present petition and counter petition were tried and adjudicated in the trial court resulting in a trial court order that no change of circumstances had occurred between September 19, 2002, and the date of the supplemental proceedings ending June 8, 2004. By its order of July 12, 2004, the court found no material change of circumstances relating to the children and dismissed Appellant's counter petition. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S. and PATRICIA J. COTTRELL, J., joined.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Ann Margaret Kalisz Shofner, M.D.

John J. Hollins, Sr. and James L. Weatherly, Jr., Nashville, Tennessee, for the appellee, Robert Stewart Shofner, M.D.

OPINION

In order to clearly comprehend the complexities of this litigation and the background for the present proceeding, a careful reading of our opinion in *Shofner v. Shofner*, 181 S.W.3d 703 (Tenn.Ct.App.2004) is recommended; however, little would be gained by recounting the history of this case so well articulated therein.

The record shows that the trial court on September 19, 2002, entered an order relative to the custody of the three children of the parties which placed custody of the older child, Robert, with Dr. Kalisz and the two younger children, Andrew and Alyssa, were placed in the custody of Dr. Shofner. Dr. Kalisz appealed the case to this Court, and while that appeal was pending, further proceedings

were held in the trial court essentially asserting that events occurring subsequent to September 19, 2002, established a material change of circumstances justifying a change of custody. After hearing the proof presented as to these events, the trial court entered an order on July 12, 2004, finding no change of circumstances between September 19, 2002, and July 12, 2004, that would justify changing the custody arrangement. The July 12, 2004, Order of the trial court is the subject of the present appeal.

On December 23, 2004, this Court entered its opinion and judgment in the prior appeal addressing in detail the issues made before this Court and approving the September 19, 2002, custody order of the trial court.

In pertinent part this Court held:

> The principal substantive issue in this case is the propriety of the custody arrangement that has been in place for over two years. Dr. Kalisz asserts that the portion of the September 19, 2002 order placing Alyssa and Andrew in Dr. Shofner's custody is not in their best interests because Dr. Shofner is unfit to be the children's primary custodial parent. Having carefully reviewed the voluminous record, we determined that it does not contain sufficient evidence to warrant overturning the existing custody arrangement.
>
> . . .
>
> We affirm the portion of the June 10, 2003 order making the parenting plan in the September 19, 2002 order permanent and remand the case to the trial court for further proceedings consistent with this opinion. We tax the costs of this appeal in equal proportions to the parties and their sureties for which execution, if necessary, may issue.

Shofner, 181 S.W.3d at 717, 719.

Dr. Kalisz filed a Petition to Rehear, which was denied by this Court on January 11, 2005, in an order stating:

> Our December 23, 2004 opinion is intended to conclude, once and for all, the direct appellate review of the propriety of the custody arrangement that has been in place for over two years. As we pointed out in our opinion, Dr. Kalisz is not foreclosed from filing and pursuing a petition to change custody which, if successful, could result in a modification of the custody arrangement which we have affirmed. She has, in fact, already filed such a petition , and her appeal from the trial court's denial of that petition has already been filed with this court. That appeal will provide Dr. Kalisz with an opportunity to demonstrate to this court how the intervening changes in the circumstances of the parties and their children warrant reopening the

> existing custody order that we have affirmed. Embarking on a re-examination of the merits of the September 2002 custody order will confuse, rather than clarify, the issues that are now before the courts.

Shofner, 181 S.W.3d at 720. Permission to appeal was denied by the Supreme Court on October 24, 2005.

Dr. Shofner's Petition to Set Child Support, for a Restraining Order and to Modify the Permanent Parenting Plan of September 19, 2002, was filed September 10, 2003. The Petition alleged Dr. Kalisz's subsequent employment as a physician and requested child support based upon consideration of her new income. Dr. Kalisz responded with a motion to dismiss all but the request for child support. In addition, she filed a Counter Petition for Modification of Parenting Plan. The primary changes of circumstance alleged by Dr. Kalisz are that the children miss each other, that Robert's aggression toward his younger siblings has subsided, and that the relationship between Dr. Shofner and Andrew is growing more abusive. As an alternative Dr. Kalisz attempted to show that the youngest child, Andrew, is now becoming more aggressive toward his sister Alyssa. Prior to the evidentiary hearing on the petitions, Dr. Kalisz filed a Motion for Recusal of the Trial Court on May 14, 2004. The court heard argument on this Motion on May 21, 2004, after which the Motion to Recuse was denied.

The petitions were heard on June 7-8, 2004. Both parties testified. Dr. Shofner presented testimony from Mary Horner, the nanny who took care of the children while they were in his residential custody; Sister Helen Cain, Alyssa's math teacher at St. Bernard Academy; and, Dr. Woodman, the psychiatrist who treated the children pursuant to court order. Dr. Kalisz called the maternal grandmother and two maternal aunts as witnesses. In addition, Dr. Kalisz called both younger children to the stand to testify as to their preference. After that hearing, the court entered its decree awarding Dr. Shofner child support in the amount of $548 per month. The court also specifically found that there had been no material change in circumstances and dismissed Dr. Kalisz' Petition for Custody and Other Relief.

The first two issues raised by Dr. Kalisz on this appeal concern the trial court's refusal to recuse itself and failure to properly certify familiarity with the record pursuant to Tennessee Rule of Civil Procedure 63.

The Motion to Recuse was on the basis that a former counsel for the appellee served as special master for the trial court. There is no allegation or proof in the record that the special master heard any part of the case now on appeal or had any communications with the trial judge concerning these parties. A Motion to Recuse addresses itself to the sound discretion of the trial judge whose judgment will not be reversed on appeal absent a clear abuse of discretion. *Young v. Young*, 971 S.W.2d 386, 390 (Tenn.Ct.App.1997); *Wiseman v. Spaulding*, 573 S.W.2d 490, 493 (Tenn.Ct.App.1978). We find no basis in the record to disturb the discretionary action of the trial court. *Young v. Young*, 971 S.W.2d at 390; *see also Caruthers v. State*, 814 S.W.2d 64, 67 (Tenn.Crim.App.1991).

Since the trial court heard all proceedings which formed the basis for her rulings in the issues now before this Court, Tennessee Rule of Civil Procedure 63 has no application. The prime issues asserted by Dr. Kalisz on appeal are:

> I. Whether the trial court erred in refusing to allow Dr. Kalisz to make offers of proof related to certain portions of the testimony;
>
> II. Whether the trial court erred in determining that Dr. Kalisz had failed to prove a material change of circumstances necessitating a modification of the parenting plan.

The standard of review in these cases is well settled:

> We review the trial court's conclusions of law "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn.2001). Furthermore, our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn.R.App.P. 13(d); *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn.1984); *see also Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn.1990). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn.1997).

Kendrick v. Shoemake, 90 S.W.3d 566, 569-70 (Tenn.2002).

Likewise, when the decisions of a trial court hinge on the credibility of witnesses, we decline to second guess those credibility determinations.

> One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determination. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn.1990); *Tenn.-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn.1989). Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary. *See Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn.1978); *Thompson v. Creswell Indus. Supply, Inc.*, 936 S.W.2d 955, 957 (Tenn.Ct.App.1996).
>
> The most often cited reason for this principle can be traced to the fact that trial judges, unlike appellate judges, have an opportunity to observe the manner and demeanor of the witnesses while they are testifying. *See Bowman v. Bowman*, 936 S.W.2d 563, 566 (Tenn.Ct.App.1991). There are, however, other reasons for this principle. As the United States Supreme Court has observed:

> The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.
>
> *Anderson v. City of Bessemer City*, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn.Ct.App.1998).

Although the record before this Court is more complete than it was at the time of our prior opinion, Dr. Kalisz poses the same underlying question: has there been any material change of circumstance which would trigger a new analysis of the children's best interest and the comparative fitness of Dr. Kalisz and Dr. Shofner to exercise care and custody over Alyssa and Andrew? In presenting her evidence concerning the changes alleged in her lengthy petition, Dr. Kalizs attempted to elicit testimony from her sister Kristine Kalisz-Manderson to the effect that Andrew had expressed animosity toward his father. The following exchange took place:

Q.	(By Mr. Herbison) Let me ask you, have you heard Andrew express animosity toward his father?
MR. HOLLINS:	Objection. That's hearsay.
THE COURT:	Sustain.
MR. HERBISON:	State of mind, Your Honor.
MR. HOLLINS:	It's hearsay. You've already ruled me out three times.
THE COURT:	And I'll rule Mr. Herbison out too. That dog won't hunt in here. You've got to play fair.
MR. HERBISON:	I understand.
Q.	(By Mr. Herbison) Have you heard Andrew wish specific harm upon his father?
A.	I have.
MR. HOLLINS:	Objection.
THE COURT:	Sustain.
MR. HERBISON:	Your Honor, that's something I would need to make an offer of proof on.
THE COURT:	And I'm not going to allow it. Take me up to the Court of Appeals. We're going to be fair in this. I'll sustain the objection.

Dr. Kalisz then attempted to elicit testimony from Renita Kalisz about a separate incident where Andrew became upset allegedly due to some prior occurrence at Dr. Shofner's home.

Q.	(By Mr. Herbison) During that time frame while the children have been living with their father, did you observe an incident where Andrew became very upset at a mealtime?
A.	Yes.
Q.	Tell the court about that, please.
A.	Well, we were just sitting down to a regular dinner and doing our own thing, having everything served on platters, as my mother does, so that each person can take as much as they want to. And then –
Q.	And your mother is Elizabeth Kalisz who testified here earlier?
A.	That's correct.
Q.	Okay. Go ahead, please.
A.	And my mom went in to get some special bread or something and she said, "Oh, Andrew, you might want some of this too" and put it on her plate. And all of a sudden, he paused and broke out like a kid who never cries, just broke out into tears and went running into his room. And it perplexed all of us what had happened, because we just didn't know. And so I went after him and –
Q.	He jumped up from the table and ran into his bedroom?
A.	Yeah. I'm like, "Andrew, what happened?" and then he said, "I don't want to talk to you" __
MR. HOLLINS:	Objection.
THE COURT:	Do not repeat what the child said.
MR. HERBISON:	Your Honor, if I could –
THE WITNESS:	But he was crying.
MR. HERBISON:	I would like to lay a little more foundation here and make it admissible.
Q.	(By Mr. Herbison) You had the conversation with the child?
A.	Yes.
Q.	And what did you observe of what appeared to be his emotional state at the time?
MR. HOLLINS:	Objection.
THE COURT:	Overrule.
A.	He was distraught at the idea of having to be –
MR. HOLLINS:	I'm objecting to that.
THE COURT:	You cannot say what the child said. You can tell what you observed but not what the child said.
MR. HOLLINS:	I'm asking for the child's affect, whether the child displayed emotion or excitement or –
THE WITNESS:	He was extremely upset.
Q.	(By MR. HERBISON) What was his tone of voice?

A.	Just absolute – he was just totally – he was just so upset and shaking.
Q.	Agitated tone of voice?
A.	Yes.
MR. HERBISON:	Your Honor, we have a state-of-mind exception clearly with the foundation laid.
THE COURT:	Not in here, Mr. Herbison. Overrule your objection. You are not going to get this hearsay in. You're the one that's telling me you're bringing these children into the courtroom. Save the question for them.
MR. HERBISON:	I understand, Your Honor makes the same ruling I will have preserved it.
THE COURT:	You can testify what you observed, not what the child said.

According to the assertion of counsel for Dr. Kalisz, he desired to prove the "state of mind" of young Andrew at the time he broke into tears and ran into his room. The witness had already testified however as to his state of mind indicating that he was "extremely upset" and "physically shaking." The court then refused to allow counsel to inquire as to what Andrew then said to the witness pointing out to counsel, "You're the one that's telling me you're bringing these children into the courtroom. Save the question for them."

While the trial court allowed no offer of proof, counsel for Appellant in reply brief before this Court asserts:

> Specifically, Mother sought to show that Andrew became upset at dinner because he believed that his grandmother, Elizabeth Kalisz, was forcing him to finish all his food in the same way that Father forced him to eat all of his dinner at Father's house. Father's practice upset Andrew greatly, as he believed that it contributed to his major weight gain that had occurred since he began living with Father.

If such was indeed to be the offer of proof desired, it had nothing to do with proof of state of mind, which had already been established in the questioning, but rather a hearsay recitation of the alleged cause for his state of mind. Even assuming that such matters were properly in the record before the Court, it would serve only to further buttress the correctness of the rulings of the trial court. Historically and subsequent to the promulgation of Federal Rule of Evidence 803(3) hearsay statements by the declarant purporting to establish the reasons underlying his state of mind were not admissible as such were barred by the hearsay evidence rule.

Prior to the advent of Federal Rule of Evidence 803(3), the "state of mind" exception to the hearsay evidence rule did not permit such declarations:

> The plaintiffs further say that the declaration was admissible as evidence of Mrs. Drake's state of mind. It is true that declarations of state of mind may be received, pertaining to pain, suffering, design, intent, or motive (Wigmore, Evidence,

> 3d Ed., §§ 1714-1740), but it is to be noted that the declaration in this instance did not concern what the declarant felt, but did concern the external circumstances causing injury. As such it did not satisfy the principle of necessity, nor was it , as we have seen such as must be thought to have been evoked by the mental state induced by the accident. Ib. § 1722, and compare *Boulanger v. McQuesten & Lewis*, 79 N.H. 175, 176, 106 A. 492.

Bennett v. Bennett, 31 A.2d 374, 380 (N.H.1943).

After the adoption in the federal court system of Federal Rule of Evidence 803(3), the issue was addressed in *United States v. Leon Cohen*, 631 F.2d 1223 (5th Cir.1980). The Court held:

> Cohen next complains that the lower court erred in excluding evidence of out-of-court conversations. Witnesses were called by the defense for the purpose of corroborating Cohen's later direct testimony concerning alleged threats by Galkin, the co-conspirator. They were asked to relate the substance of out-of-court conversations they had had with Cohen at the time he was supposed to have been threatened, and some testimony was admitted. They would have testified to comments made by Cohen to the effect that Galkin was threatening him.[1] Appellant seeks to stretch the limited scope of admissibility under F.R.E. 803(3). That rule by its own terms excepts from the ban on hearsay such statements as might have been made by Cohen of his then existing state of mind or emotion, but expressly excludes from the operation of the rule a statement of belief to prove the fact believed.[2] The rule thus permitted the witnesses to relate any out-of-court statements Cohen had made to them to the effect that he was scared, anxious, sad, or in any other state reflecting his then existing mental or emotional condition. And this for the purpose of proving the truth of the matter asserted in the statement – that Cohen actually was afraid or distraught – because the preamble to F.R.E. 803 provides that such testimony "is not excluded by the hearsay rule." But the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. if the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition – "I'm scared" – and not belief – "I'm scared because Galkin threatened me." Cohen's witnesses were permitted to relate any direct statements he had made concerning his state of mind but were prevented only from testifying as to his statements of belief – that he believed that Galkin was threatening him. There was no error.
>
> 1. Appellant misstates the scope of the lower court's alleged error in limiting the testimony of witnesses Hoytt and Kaplan. The rulings objected to, as is clear from counsel's statement from the record at R. 5-71, concerned the testimony of Nixdorff and those who testified after him, Rappaport and Mrs. Cohen. The court did not limit the testimony of Hoytt and Kaplan; counsel's own questions, and his effort to introduce their testimony via F.R.E. 803(3), nevertheless had that effect.

> 2. F.R.E. 803(3) provides:
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (3) Then existing mental, emotional, or physical condition.— A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.
>
> The Advisory Committee Notes make it clear that the "exclusion of 'statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind."

United States v. Cohen, 631 F.2d 1223, 1225 (5th Cir.1980).

Tennessee Rule of Evidence 803(3) is identical to the federal rule of evidence.

It is not asserted by Appellant that the purported out-of-court declaration exhibits the spontaneity required for an "excited utterance" under Tennessee Rule of Evidence 803(2) or was made to medical personnel for diagnosis and treatment so as to qualify under Tennessee Rule of Evidence 803(4). *See State v. Duncan*, 2005 Tenn.Crim.App., Lexus 769 (Tenn.Crim.App., July 27, 2005). The only other rule of evidence under which such declarations could be admitted into evidence in the face of a hearsay objection is that of a child's statement under Tennessee Rule of Evidence 803(25). This narrow exception, extended to custody proceedings by amendment effective July 1, 2003, is carefully constructed, and its application to a given case is largely in the discretion of the trial court.

> Hence, the admissibility of the extrajudicial statements depends upon the trustworthiness of the statements. In this instance, we are of the opinion that the circumstances do not militate against the trustworthiness of the statements about which the mother complains. While we find no authority for or against the proposition, we are of the opinion that the determination of trustworthiness is a matter for the trial court to decide and his decision will not be disturbed on appeal unless there is a showing of abuse of discretion. We find no circumstances in the record which persuade us that the statements complained of are not trustworthy, therefore, there is no abuse of discretion. We should also note that there is evidence corroborating the statements made by the child or children. Here, the court resolved the issue of trustworthiness in favor of the witnesses. Where the trial judge has seen and heard the witnesses, especially if issues of credibility and weight to be given oral testimony are involved, considerable deference must be accorded those circumstances on review. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412 (Tenn.1995).

Dept. of Human Servs. v. Purcell, 955 S.W.2d 607, 609 (Tenn.Ct.App.1997).

The advisory comments to Tennessee Rule of Evidence 803(25) are enlightening.

> Rule 803(25) is a narrow exception. It applies only if the specified issues are material. Even then it is inapplicable if the minor declarant has reached age thirteen by the time of hearing and is available as a witness but does not testify.
>
> Declarations under this hearsay exception are inadmissible if "circumstances indicate lack of trustworthiness."

Tenn.R.Evid. 803 (25) Adv. Comm'n Cmts.

At no point in the record does Appellant assert that the out-of-court declarations of Andrew were admissible under Tennessee Rule of Evidence 803(25). The sole basis for the purported offer of proof is to establish the "state of mind" of Andrew. The "state of mind" exception to the hearsay rule is governed by Tennessee Rule of Evidence 803(3). It is well to note that the alleged out-of-court declarations of Andrew considered in the context in which they are offered are not otherwise corroborated in the record, even by Andrew himself.

It cannot be said that the trial court abused its discretion even if consideration is given to Tennessee Rule of Evidence 803(25), and even if the failure of the trial court to allow the specifics of a tender of proof was error, it is clearly harmless error under Tennessee Rule of Appellate Procedure 36(b).

Another sound reason exists for refusing to disturb the action of the trial court relative to the out-of-court statements of Andrew. Counsel for Dr. Kalisz made it clear at the outset of the trial that he intended to call both Andrew and Alyssa as witnesses in the case. At the time counsel for Dr. Kalisz asserted that his offer of proof was to be based upon the "state-of-mind exception" to the hearsay evidence rule, the court stated, " You're not going to get this hearsay in. You're the one that's telling me you're bringing these children into the courtroom. Save the question for them."

True to his word, counsel called both Andrew and Alyssa as witnesses but posed not a single question to either of them concerning the incident about which Renita Kalisz testified. It is clear that the action of the trial court in denying Appellant the opportunity to make a tender of proof was based in significant part upon the assurances of counsel that both of the children would in fact be called as witnesses.

> The doctrine of estoppel underlies all branches of jurisprudence. Particularly is it operative and effective in matters of procedure and clearly so with respect to the taking of steps in the trial of a cause. One of the rules derived from these principles is that if the attorney representing a litigant stands by and permits the court to assume a certain attitude or state a certain theory or contention known to the attorney to be incorrect, it is his duty to direct the attention of the court to his wrongful position or assumptions. This is peculiarly applicable to instructions delivered by the Judge to the jury. The practice now is for attorneys by appropriate special request or by some

> other method, to inform the court that he is making manifest misstatements of fact. There can be no disputing the proposition that in situations such as these the parties affected should speak out and that they should be held estopped to complain about an error which was one likely to occur and one which could have been so easily corrected. See Hosiery Mills v. Napper, 124 Tenn., 155; Nashville v. Patton, 2 Higgins, 515. This should be classed as an invited or permitted or sanctioned error. It is well established that such steps cannot be made the basis of an assignment of error in the absence of timely efforts to correct.

Bealafelt v. Hicks, 13 Tenn.App. 18, 21-22 (1930); *see also Pickard v. Ferrell*, 325 S.W.2d 288, 294 (Tenn.Ct.App.1959), *Gentry v. Betty Lou Bakeries*, 100 S.W.2d 230 (Tenn.1937), *Grandstaff v. Hawks*, 36 S.W.3d 482 (Tenn.Ct.App.2000). If counsel did not intend to question Andrew about the incident, as indeed he did not question him, he should have informed the court rather than leaving the court with the impression that Andrew would explain the incident.

The change of circumstances necessary to trigger the best interest analysis and fitness comparison must be one which, though not contemplated at the time of the original custody order, occurs after that order and "affects the child[ren]'s well-being in a meaningful way." *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn.2002). Dr. Woodman gave strong testimony that the children are coping despite the combat which continues between Drs. Shofner and Kalisz. In his direct testimony, Dr. Woodman summarized the changes in Alyssa and Andrew's behavior throughout the divorce. "There's interactions that are more positive, and there's a developed relationship between [the children]."

He testified that on the whole, the children have neither progressed nor regressed in terms of aggressive acting out. On cross examination, Dr. Woodman opined that since the divorce, both children did well in school regardless of whether they stayed with Dr. Kalisz or Dr. Shofner. He testified that although several counseling sessions with the children began with some blanket statement of preference in favor of Dr. Kalisz, each child gives specific instances of enjoyable activity with the father. The children themselves testified to this preference for the mother. Andrew's testimony supported the claims of corporal punishment alleged by Mother. Nevertheless, he has enjoyed his time with Dr. Shofner as well, despite the disciplinary differences between the two parents that continue to this day. The only testimony which appears unbiased in this record comes from Dr. Woodman, who testifies that the children are not suffering from any material change in circumstances. The oldest child Robert did not testify, and his aggressive behavior remains a concern. The younger children, despite their protestations to the contrary seem to be thriving under Dr. Shofner's custody. Despite Dr. Kalisz's accusations of abuse and Dr. Shofner's corresponding allegations of overprotective and overindulgent behavior, the current custody arrangement appears to be working.

The trial court heard the testimony of the witnesses and reviewed all of the evidence and found that the change of circumstance alleged by Dr. Kalisz was not borne out in the record. Upon

our *de novo* review according the presumption of correctness due on appeal, Tenn.R.App.P. 13 (d), we hold that the evidence does not preponderate against that finding.

Separating siblings is an extreme resolution in custody decisions involving multiple children. *See Ray v. Ray*, 83 S.W.3d 726, 738 (Tenn.Ct.App. 2001). Nevertheless, when the totality of the circumstances as shown in the record supports the division in the first instance, and a petitioner, as here, fails to establish a material change of circumstances necessitating a reevaluation, the refusal to modify separate custody arrangements is warranted. The judgment of the trial court is affirmed in all respects and the cause is remanded for further proceedings consistent herewith. Costs of appeal are assessed against Appellant.

_____

WILLIAM B. CAIN, JUDGE